MALAYAN BANKING BHD & ANOR v. BANK KERJASAMA RAKYAT MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[ORIGINATING SUMMONS NO: 24NCC-68-02-2015]
31 JANUARY 2016

BANKING: *Securities for advances – Charge – Debentures creating charge over assets of company – Whether plaintiffs' charges created prior to defendant's charge over company's monies took priority – Cause of action – Whether plaintiffs entitled to seek declaratory relief against defendant – Specific Relief Act 1950, s. 41 – Whether company was necessary party to action – Whether plaintiffs' charges covered monies deposited with defendant – Whether plaintiffs consented to monies being excluded from plaintiffs' charges – Whether plaintiffs estopped from claiming priority over monies – Whether defendant's charge could override plaintiffs' charges*

The first plaintiff granted banking facilities to Instyle Furniture Industries Sdn Bhd ('Instyle') between the year 2003 to 2006. The first plaintiff, by four debentures dated 29 January 2003, 28 February 2005, 28 February 2005 (Islamic Banking Scheme) and 22 November 2006, held charges over the assets of Instyle as security for the banking facilities ('plaintiffs' charges'). The debenture dated 28 February 2005 (Islamic Banking Scheme) was subsequently transferred from the first plaintiff and vested in the second plaintiff pursuant to a vesting order. The defendant granted banking facilities to Instyle in 2008. One of the securities the defendant took was a charge created on 13 March 2009 over monies of Instyle ('defendant's charge'). *Vide* an originating summons (encl. 1), the plaintiffs sought, *inter alia*, a declaration that certain charges created by Instyle in favour of the plaintiffs ranked in priority to a charge created by Instyle in favour of the defendant and consequently, that the defendant pay to the plaintiffs all monies deposited with and charged by Instyle in favour of the defendant up to the amount due and owing by the borrower to the plaintiffs. It was the plaintiffs' contention, *inter alia*, that (i) the plaintiffs' charges were created prior to the defendant's charge, therefore the plaintiffs' charges had priority over the defendant's charge; (ii) the defendant was well aware of the plaintiffs' existing charges when it took a charge over the monies; (iii) the plaintiffs' charges were created earlier in 2003, 2005 and 2006 while the defendant's charge was created much later in 2009; (iv) the plaintiffs did not consent to the defendant taking security over any other asset of Instyle including the monies of Instyle; and (v) not only was the defendant well aware of the plaintiffs' existing and prior charges, the defendant was also well aware that the plaintiffs' consent was only limited to the certain specific assets specified. Despite this, the defendant proceeded to take security over the monies that were already subjected to the plaintiffs' charges. The defendant, however, replied that the plaintiffs' application was wrong in law and that, *inter alia*,

A if the plaintiffs had any proprietary interest in the Instyle Deposit, the cause of action must be against Instyle and not the defendant. The issues that arose for determination were (a) whether the plaintiffs had a cause of action against the defendant; (b) whether Instyle was a necessary party to the action; (c) whether the plaintiffs' charges covered the monies deposited with the B defendant; (d) whether the defendant had no notice of the plaintiffs' floating charge; and (e) whether the plaintiffs were estopped from claiming priority over the defendant's charge.

Held (granting order in terms of prayers):

C **(1)** Both the plaintiffs and defendant had taken a security in the form of charges over the assets of Instyle in particular its monies. The plaintiffs claimed that the plaintiffs had priority over the defendant's charge, *to wit* the defendant denied the same. Hence, the plaintiffs were entitled to move the court under s. 41 of the Specific Relief Act 1950 to seek the declaration and consequential orders against the defendant. The D plaintiffs could also seek a declaratory relief under O. 15 r. 6 of the Rules of Court 2012 by demonstrating they had a real interest in the subject matter of the action. Undoubtedly, the plaintiffs had a real interest to assert that the plaintiffs' charges had priority over the defendant's charge. Thus, the plaintiffs had a cause of action against the E defendant. (paras 15 & 21)

(2) Instyle had been notified of and with served the cause papers in this action *vide* the plaintiffs' solicitors. Instyle had the requisite knowledge and may apply to intervene and to have itself added as a party to the proceeding and it was up to the court to decide in the exercise of its F discretion whether to allow the same. Since Instyle chose to leave it to the court to decide, it will be bound by the court's decision. Therefore, Instyle was not a necessary party to the action as the dispute was essentially between the plaintiffs and the defendant as to whether the plaintiffs' charges or the defendant's charge had priority; and the G plaintiffs were not making any claim or seeking any orders against Instyle. (paras 24, 26 & 27)

(3) By virtue of the existence of the common provision creating the charge in cl. 3(1)(b) of all the four debentures, cl. 3(1)(b) expressly and unequivocally created a charge over Instyle's undertaking and assets H both present and future including bank deposits and credit balances. In any event, even if it could be argued that a charge could not be created over a future account, there was no evidence led by the defendant that the monies deposited in the account were not in existence at the time the plaintiffs' charges were created. (paras 32 & 36)

I **(4)** The defendant was aware of the plaintiffs' charges as the defendant's own solicitors had by a letter sought the plaintiffs' consent to exclude certain assets (including the monies) from the plaintiffs' charges. The

fact that the defendant sought the plaintiffs' consent to exclude the monies from the plaintiffs' charges showed that the defendant was well aware that the plaintiffs' charges covered the monies. The plaintiffs were able to adduce evidence whereby the defendant was aware of the plaintiffs' charges and that consent was only limited to the specific assets specified; this negated the defendant's argument that the defendant did not have actual notice of the contents of the plaintiffs' charges and they did not bind the defendant. (paras 42, 43 & 46)

(5) The plaintiffs did not at any time lead the defendant to believe that the plaintiffs consented to the monies being excluded from the plaintiffs' charges. It was expressly made known to the defendant that other than certain specific assets that the plaintiff had agreed to exclude which did not include the moneys, the plaintiffs' right as debenture holder remained intact. It was the defendant who still proceeded to take a charge over the monies knowing that the plaintiffs had not excluded the monies from the plaintiffs' charges. Thus, the plaintiffs were not estopped from claiming priority over the monies. On the factual matrix of the present case, the defendant's charge could not override the plaintiffs' charges premised on the principle in *Kay Hian & Co (Pte) v. Jon Phua Ooi Yong & Ors* (paras 47 & 50)

Case(s) referred to:

Affin Bank Bhd v. Malayan Banking Bhd [2009] 3 CLJ 320 CA ***(foll)***
Bank of Western Australia Limited v. National Australia Bank Limited [2011] QSC 379 ***(dist)***
CIMB Bank Bhd v. ZAQ Construction Sdn Bhd [2013] 1 LNS 230 HC ***(refd)***
Evans v. Rival Granite Quarries Ltd [1910] 2 KB 979 ***(refd)***
Kay Hian & Co (Pte) v. Jon Phua Ooi Yong & Ors [1988] 1 LNS 216 HC ***(foll)***
Majumder v. Attorney-General of Sarawak [1966] 1 LNS 97 FC ***(dist)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Re Panama, New Zealand, And Australian Royal Mail Company (1870) 5 Ch App 318 ***(refd)***
Re Yorkshire Woolcombers Association Ltd [1903] 2 Ch 284 ***(refd)***
Tan Bun Teet & Ors v. Menteri Sains, Teknologi Dan Inovasi Malaysia & Ors [2013] 3 CLJ 1115 CA ***(dist)***
Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 1 LNS 2 FC ***(refd)***
Tradium Sdn Bhd v. Zain Azahari Zainal Abidin & Anor [1996] 2 CLJ 270 CA ***(foll)***

Legislation referred to:

Companies Act 1965, s. 108
Rules of Court 2012, O. 15 r. 6, O. 43 r. 4(1)
Rules of the High Court 1980, O. 15 r. 6, O. 53 r. 4
Specific Relief Act 1950, s. 41

Other source(s) referred to:

Jaginder Singh, David E Allan, Mary E Hiscock & Derek Roebuck, *Legal Problems of Development Finance*, pp 313-314
RM Goode, *Legal Problems of Credit and Security*, 2nd edn, pp. 47-49
RM Goode, *Legal Problems of Credit And Security and Credit and Security in West Malaysia*, p 41

A *For the plaintiffs - Sean Yeow (Aric Wong with him); M/s Lee Hishammuddin Allen & Gledhill*
For the defendant - Muhammad Chwa (Muhammad Zaim Azfar Jalaludin with him); M/s Zaim & Zaki

Reported by Suhainah Wahiduddin

B

JUDGMENT

Lau Bee Lan J:

Introduction

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[1] *Vide* an originating summons dated 16 February 2015 (encl. 1) the plaintiffs seek the following relief:

(1) A declaration that the charges created by Instyle Furniture Industries Sdn Bhd over its assets in favour of the 1st Plaintiff under the Debentures dated 29/1/2003, 28/2/2005 and 22/11/2006 rank in priority to the charge created by Instyle Furniture Industries Sdn Bhd in favour of the Defendant on 13/3/2009;

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(2) A declaration that the charges created by Instyle Furniture Industries Sdn Bhd over its assets in favour of the 1st Plaintiff under the Debentures dated 28/2/2005 (Islamic Banking Scheme) that has since been vested in the 2nd Plaintiff rank in priority to the charge created by Instyle Furniture Industries Sdn Bhd in favour of the Defendant on 13/3/2009;

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(3) An account by the Defendant of all monies deposited with the Defendant and charged by Instyle Furniture Industries Sdn Bhd in favour of the Defendant under to the charge created by Instyle Furniture Industries Sdn Bhd in favour of the Defendant on 13/3/2009;

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(4) The Defendant pays to the 1st Plaintiff all monies deposited with and charged by Instyle Furniture Industries Sdn Bhd in favour of the Defendant under the charge created by Instyle Furniture Industries Sdn Bhd in favour of the Defendant on 13/3/2009 up to the sum RM19,319,801.18 together with interest on the respective amounts at the respective rates set out in Schedule 1 annexed herein and capitalised monthly from 1/2/2015 until the date of full payment;

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(5) The Defendant pays to the 2nd Plaintiff all monies deposited with and charged by Instyle Furniture Industries Sdn Bhd in favour of the Defendant under the charge created by Instyle Furniture Industries Sdn Bhd in favour of the Defendant on 13/3/2009 up to the sum RM5,121,523.24 together with profit and *ta'widh* accruing at the rate of 2.25% per annum above the Plaintiff's Base Financing Rate (presently at 6.85% per annum) and capitalised monthly from 1/2/2015 until full payment;

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(6) Costs; and

(7) Such further or other relief that this Honourable Court deems fit.

[2] Basically, the plaintiffs are seeking for a declaration that certain charges created by Instyle Furniture Industries Sdn Bhd ('borrower/Instyle') in favour of the plaintiffs rank in priority to a charge created by the Instyle in favour of the defendant and consequently that the defendant pays to the plaintiffs all monies deposited with and charged by Instyle in favour of the defendant up to the amount due and owing by the borrower to the plaintiffs.

[3] The affidavits in this case in chronological order are:

(a) Plaintiffs' affidavit in support affirmed by Nor Lida binti Raja Omar on 16 February 2015 (encl. 2);

(b) Defendant's affidavit in reply affirmed by Nasharuddin bin Ayub on 13 March 2015 (encl. 4);

(c) Plaintiffs' second affidavit affirmed by Nor Lida binti Raja Omar on 30 March 2015 (encl. 5);

(d) Defendant's second affidavit affirmed by Nasharuddin bin Ayub on 15 April 2015 (encl. 6); and

(e) Plaintiffs' third affidavit affirmed by Nor Lida binti Raja Omar on 29 April 2015 (encl. 10).

[4] The brief facts of the case which are not disputed are these.

[5] The first plaintiff granted banking facilities to Instyle Furniture Industries Sdn Bhd ('Instyle') between 2003 and 2006. The first plaintiff, by four debentures dated 29 January 2003, 28 February 2005, 28 February 2005 (Islamic Banking Scheme) and 22 November 2006 (exhs. MBB-1, MBB-2, MBB-3 and MBB-4, plaintiffs' affidavit), holds charges over the assets of Instyle as security for the banking facilities ('plaintiffs' charges'). The debenture dated 28 February 2005 (Islamic Banking Scheme) was subsequently transferred from the first plaintiff and vested in the second plaintiff pursuant to a vesting order dated 12 February 2007 (exhs. MBB-5, plaintiffs' affidavit in support).

[6] The defendant granted banking facilities to Instyle in 2008. One of the securities the defendant took was a charge created on 13 March 2009 over monies of Instyle (exhs. MBB-8, plaintiffs' affidavit in support) (defendant's charge).

[7] Both the plaintiffs' charges and the defendant's charge are duly registered as required by s. 108 of the Companies Act 1965. The plaintiffs' charges are registered with the Companies Commission of Malaysia as charge nos. 1, 6, 7 and 12, while the defendant's charge over the monies is registered as charge no. 16 (exhs. NBA-4, defendant's affidavit in reply).

[8] After having considered the written *cum* oral submissions of the plaintiffs and the defendant, on 27 May 2015 I granted order in terms of prayers 1, 2, 3, ie, the defendant shall provide the account by way of an affidavit to be filed and served within 21 days pursuant to O. 43 r. 4(1) of the Rules of Court 2012 ('RC 2012'), 4, 5 and 6, ie, costs of RM15,000 to be paid by the defendant to the plaintiffs.

[9] The defendant has appealed against the aforesaid decision. Herein below are the reasons for the decision.

Parties' Contentions

[10] The plaintiffs contended that:

(a) the plaintiffs' charges were created prior to the defendant's charge. The plaintiffs' charges therefore have priority over the defendant's charge;

(b) the defendant was also well aware of the existing plaintiffs' charges when it took a charge over the monies. This is evident by the fact that the defendant had sought the plaintiffs' consent to take security over certain assets of Instyle;

(c) the plaintiffs' charges were created on 29 January 2003, 28 February 2005, 28 February 2005 and 22 November 2006. The defendant's charge was only created much later on 13 March 2009. This is also reflected in the Register of Charges. The plaintiffs' charges are registered with the Companies Commission of Malaysia as charge nos. 1, 6, 7 and 12, while the defendant's charge over the monies is registered much later as charge no. 16 (exhs. NBA-4, defendant's affidavit in reply);

(d) the defendant was well aware of the plaintiffs' charges. By letters dated 15 January 2009 and 6 July 2010 to the defendant, the first plaintiff consented only to the defendant taking security over all the new plants, equipment and machineries of Instyle for particle board production to be financed by the defendant and over Geran 37014 Lot 2370 and Geran 40187 Lot 2778, both Mukim Parit Jawa, Muar;

(e) the plaintiffs did not consent to the defendant taking security over any other asset of Instyle including the monies of Instyle. It was expressly stated in the plaintiffs' letters of 15 January 2009 and 6 July 2010 that 'our rights as debenture holder with the above borrower shall remain intact except for the abovementioned securities';

(f) as such, not only was the defendant well aware of the plaintiffs' existing and prior charges, the defendant was also well aware that the plaintiffs' consent was only limited to the certain specific assets specified. Despite this, the defendant still proceeded to take security over the monies that were already subjected to the plaintiffs' charges.

[11] The defendant replied that:

(i) since there is no permission or authorisation application on the Instyle's monies as securities, the monies deposited by Instyle to the defendant are not applicable or not relevant to the plaintiffs;

(ii) Instyle still owes the defendant a sum of RM50,000 for financing facilities;

(iii) as a security for the financing facilities, Instyle has created various securities for the defendant such as charges and opening up a savings account with the defendant. Instyle had subsequently deposited monies into the bank account and granted the right to the defendant in the form of letter of set-off wherein on an event of default by Instyle, the defendant may deduct the monies from the deposit account;

(iv) based on the four charges that are registered in the first plaintiff's name, it was all registered long before the defendant's charge was registered. The plaintiffs are claiming Instyle's monies that have been deposited in the defendant's bank account;

(v) plaintiffs' application is wrong in law:

(a) the monies that are deposited in the bank account belongs to the depositor. If the plaintiffs have any proprietary interest in the Instyle's deposit, the cause of action must be against Instyle and not the defendant;

(b) defendant does not owe any money to the plaintiffs with regard to Instyle's loan with the plaintiffs; and

(c) the plaintiffs do not have any cause of action against the defendant.

(vi) even if Instyle had created a floating charge over the Instyle's deposit through the four debentures of the plaintiffs, no crystallisation ever took place;

(vii) it denies that the plaintiffs' debentures cover the Instyle's deposit in the defendant's bank as logically, the Instyle's deposit was created in the year 2009 while the plaintiffs' last debenture was dated 22 November 2006;

(viii) the plaintiffs' four debentures are irrelevant towards the Instyle's deposit in the defendant's bank;

(ix) the plaintiffs erred by virtue of the view that the issue of security is the main issue in this proceedings whereas the main issue that need to be determined by this court is whether the plaintiffs' debentures cover the Instyle's deposit in the defendant's bank or not;

(x) plaintiffs do not have any cause of action against the defendant;

(xi) plaintiffs have not only no right to claim against the defendant in respect of the Instyle's deposit but any information about the Instyle's bank account that is in the custody of the defendant is also protected by banking law;

(xii) the plaintiff indirectly admitted that they do not have any *locus standi* to bring this action against the defendant when Instyle is still existing or has not been wound up by any court;

(xiii) the main issue of priority of charges and issue concerning the right to the monies in Instyle's bank account are two different things.

[12] Summarily the defendant contended that:

(a) the plaintiffs have no cause of action against the defendant;

(b) the plaintiffs failed to name Instyle as a party;

(c) the plaintiffs failed to prove that the plaintiffs' four debentures cover the monies in question;

(d) the plaintiffs failed to prove that the amount claimed was secured by the plaintiffs' four debentures;

(e) it is impractical to consider the issue of priority when the validity of the plaintiffs' charges have yet to be ascertained;

(f) the defendant had no notice of the plaintiffs' floating charge; and

(g) the plaintiffs are estopped from claiming priority over the defendant's charge.

Findings

Plaintiffs Have No Cause Of Action

[13] With respect I am of the view the contention of the defendant that the plaintiffs have no cause of action is without merit. On the contrary in my judgment the plaintiffs have a cause of action against the defendant for the following reasons. The plaintiffs have moved the court amongst other under s. 41 of the Specific Relief Act 1950 ('the Act') as per the intitulement.

[14] Section 41 of the Act states:

> 41. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

Illustrations (c) and (d) to s. 41 of the Act are illustrative of the situations when a person may institute a suit and seek a declaration 'to any right as to any property against any person denying or interested to deny the right' over the defendant's charge.

[15] In this instant case, both the plaintiffs and defendant have taken a security in the form of charges over the assets of Instyle in particular its monies. The plaintiffs are claiming that the plaintiffs have priority over the defendant's charge, *to wit* the defendant denies the same. Hence, in my judgment the plaintiffs are entitled to move the court under s. 41 of the Act to seek the declaration and consequential orders against the defendant.

[16] A case in point where there is tussle between two financial institutions as to whose charge has priority is *Affin Bank Bhd v. Malayan Banking Bhd* [2009] 3 CLJ 320. The plaintiff, Affin Bank Bhd applied and obtained declaratory orders to the effect that (i) the plaintiff's four debentures had created a fixed specific charge over the eight million shares; and (ii) the plaintiff's charges over the shares had priority over the defendant's charge. The appeal by the defendant, Malayan Banking Berhad to the Court of Appeal was dismissed. The Court of Appeal had to determine whether on a true construction of debenture 1, the plaintiff, had obtained a fixed charge over the eight million shares and had priority over the shares which it answered in the affirmative. The facts giving rise to plaintiff's application as per the headnotes are: Wembley created a debenture dated 10 July 1995 ("debenture 1") containing fixed and floating charges over all its assets, properties and undertakings, both present and future. The debenture was created in favour of the plaintiff in consideration of banking facilities extended to Wembley. Pursuant to cl. 3(1)(f) of debenture 1, Wembley charged, *inter alia*, all shares then owned or thereafter acquired by it by way of a first fixed charge to the plaintiff. Clause 5 of debenture 1 contained a restrictive covenant prohibiting Wembley from creating any encumbrance over the charged assets without the plaintiff's written consent. By three other even dated debentures – similar in terms to debenture 1 – Wembley charged in favour of the debenture holders, by way of a first fixed charge, *inter alia*, shares owned or thereafter acquired by it. These three debentures were later novated to the plaintiff. All these four debentures were registered under s. 108 of the Companies Act 1965. Subsequent to the execution of all the four debentures, Wembley acquired title to eight million shares. Wembley then charged these eight million shares to the defendant. The defendant was put on notice that the plaintiff had a prior first fixed charge over the shares. However, the defendant sold the shares without any notice to the plaintiff.

[17] In my view the core issue before the court is whether the plaintiffs' charges rank in priority over the defendant's charge. Therefore I find the following issues raised by the defendant in connection with the issue of the plaintiff has no cause of action are irrelevant, save for the defendant's contention that the subject matter of the plaintiffs' action was not ascertained.

I am of the view that the subject matter is ascertainable; basically it is the plaintiffs' charges and the defendant's charge over the monies deposited and charged by Instyle in favour of the defendant. The defendant has not disputed that it has taken and utilised the monies. I shall address this matter further later.

[18] The other issues which I consider to be of no relevance are as submitted by the plaintiffs as follows:

> (a) The Receiver's and Manager's alleged failure to take possession of the books of Instyle and ascertain the amount of monies that the Defendant has taken has nothing to do with the Plaintiffs' claim to priority over the Defendant and the cause of action. In any event, how much money the Defendant has taken and utilised is something the Defendant very well know and they cannot say they are in the dark about.
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> (b) The fact that there is no contractual relationship between the Plaintiffs and Defendant is also irrelevant. The Plaintiffs are not asserting any contractual right against the Defendant. The Plaintiffs are merely claiming that the Plaintiffs' Charges have priority over the Defendant's Charge.
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> (c) Whose duty it is to register the charges is of no concern here. It is not disputed both the Plaintiffs' Charges and the Defendant's Charge were registered. The Plaintiffs' case is not that the Defendant's Charge was not registered.

[19] In any event I agree with the plaintiffs that it is not necessary for a plaintiff seeking declaratory relief to show he has a cause of action. In *Tan Sri Hj Othman Saat v. Mohamed Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177 the brief facts are these. The respondent and 183 other persons had applied for land in Mersing, Johore but with no response for some eight years. The respondent learnt that the land in the area had been alienated to a number of people, including the appellant, who was at all material times the Menteri Besar of the State of Johore and other personages in the upper echelon of the administrative service. The respondent applied for declarations basically impugning the validity of the alienation of the land and named as respondents thereto the State Director of Lands and Mines and the Government of the State of Johore in addition to the appellant. The appellant applied to have the proceedings struck out primarily on a challenge to the respondent's standing to sue and also on certain procedural objections (see headnotes). The appellant's application was dismissed in the High Court and he appealed to the Federal Court on the issue of the respondent's *locus standi*.

[20] I am mindful in *Tan Sri Haji Othman Saat*'s case (*supra*), the respondent proceeded under s. 41 of the Act, however Abdoolcader J (as he then was) (delivering the judgment of the Federal Court) at 178D-I left column, *inter alia*, stated "this statutory provision cannot apply as no entitlement of the respondent to any legal character or status or right to property or denial thereof is in issue." The respondent accepted in answer to queries from the

court that the declarations were in fact sought under O. 15 r. 6 of the Rules of the High Court 1980 (in *pari materia* with O. 15 r. 6 of the RC 2012). The Federal Court held:

> Although it is not necessary for a plaintiff who seeks relief by way of declaratory judgment to show that he has a present cause of action, he must be somebody with such an interest in the subject-matter of the action as to justify his seeking relief. (at 178 A-B right column);
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> On a general consideration of the authorities it would seem that the plaintiff in proceedings for a declaration need do no more than establish that he has a 'real interest' in the suit. (at 178 F-G right column).

[21] In the present case, there is no doubt that the plaintiffs can proceed under s. 41 of the Act since they are seeking for a declaration against the defendant denying the plaintiffs' charges having priority over the defendant's charge, in particular Instyle's monies. In fact this is exactly what can be deduced from the *dicta* of the Federal Court in *Tan Sri Hj Othman Saat* case at 178 D-I left column (see para. 20 above). However for the argument sake, even if the plaintiffs cannot proceed under s. 41 of the Act, the plaintiffs can still seek a declaratory relief under O. 15 r. 6 of the RC 2012, by demonstrating they have a real interest in the subject matter of the action. In this regard, undoubtedly the plaintiffs have a real interest to assert that the plaintiffs' charges have priority over the defendant's charge.

Whether Instyle Is A Necessary Party

[22] The defendant contended that it was fatal that Instyle, the borrower/chargor was not made a party to the action as Instyle will be directly affected by the court order sought by the plaintiffs and it was not given an opportunity to be heard. The defendant cited *Tan Bun Teet & Ors v. Menteri Sains, Teknologi Dan Inovasi Malaysia & Ors* [2013] 3 CLJ 1115 Rayuan Sivil No.C-01(IM)(NCVC)-490-11/2012 at 14 [11] of the judgment.

[23] The defendant further cited *Majumder v. Attorney-General of Sarawak* [1966] 1 LNS 97; [1967] 1 MLJ 101 at 104 for the proposition that "The courts should not make declarations which concern persons interested but not joined as parties".

[24] With respect the cases of *Tan Bun Teet* (*supra*) and *Majumder* (*supra*) can be distinguished. This is because Instyle has been notified of and served the cause papers in this action *vide* the plaintiffs' solicitors' letter dated 18 March 2015, duly received by Instyle on 19 March 2015 as per the endorsement (exh. MBB-12, plaintiffs' second affidavit). Instyle *vide* its receiver and manager, Mr Duar Tuan Kiat of Messrs Ernst & Young responded *vide* letter dated 28 April 2015 in the following terms:

> Based on our review of the OS, we note that the Plaintiffs have commenced proceedings against the Defendant for the recovery of monies deposited and pledged by IFISB to the Defendant during the pre-receivership period. *As the declarations sought by the Plaintiffs under the OS*

A *relate to the issue of priority over the Plaintiffs' entitlement to the pledged monies, IFISB acting by its Receiver and Manager will leave it to the High Court to decide as between the Plaintiffs and the Defendant.*

(emphasis added)

B (exh. MBB-13, plaintiffs' third affidavit).

[25] Furthermore, Instyle by leaving it to the court to decide on the issue of priority over the plaintiffs' entitlement to the pledged monies, it will be bound by the court's decision and cannot challenge it any longer. I rest on the authority of *Tradium Sdn Bhd v. Zain Azahari Zainal Abidin & Anor* [1996] 2 CLJ 270; [1995] 1 MLJ 668. In *Tradium* (*supra*) at p. 278 (C-E) (CLJ); p. 675 (F-G) (MLJ), the Court of Appeal opined:

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> A plaintiff in an action or an applicant in any other originating proceeding is entitled to pursue his suit or proceeding against any party chosen by him and cannot be compelled to join as parties persons he has omitted from impleading: *Selvamary v. G Rethinasamy* [1991] 1 MLJ 156. But any person who may be aggrieved by the decision of the court may intervene and apply to be added as a defendant or respondent. It is then for the judge in the exercise of his discretion to decide whether or not to allow such a course.
>
> The applicant in the instant case having elected to confine himself to the limited right given to it by the Rules cannot now claim to have an independent right of appeal. He has no such right. The application being devoid of merit was, for these reasons, dismissed with costs.
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> (emphasis added)

[26] I am mindful that *Tradium* case concerned an application by Tradium in seeking to intervene under O. 53 r. 4 of the Rules of the High Court 1980 read with Rules of the Court of Appeal 1994. Be that as it may, it is my respectful view that the principle nevertheless is applicable in that in this instant case, Instyle had the requisite knowledge and may apply to intervene and to have itself added as a party to the proceeding and it is up to the court to decide in the exercise of its discretion whether to allow the same. However since Instyle choose to leave it to the court to decide it will be bound by the court's decision.

[27] Further, I agree with the plaintiffs' submission that Instyle is not a necessary party to the action as the dispute is essentially between the plaintiffs and the defendant as to whether the plaintiffs' charges or the defendant's charge has priority; and the plaintiffs are not making any claim or seeking any orders against Instyle.

[28] In this regard I drew support from *Affin Bank* case (*supra*) where the borrower/chargor, Wembley Industries Holdings Berhad was not a party to the action. The facts of the case showed the issue was solely between Affin Bank Berhad and Malayan Banking Berhad as to who has priority over the eight million shares subsequently acquired by Wembley.

(see paras. 15 and 16 above).

[29] Similarly in *CIMB Bank Bhd v. ZAQ Construction Sdn Bhd* [2013] 1 LNS 230, the plaintiff sought declarations that it as a debenture holder who enjoyed priority in respect of certain specific assets of one Asia Petroleum Hub Sdn Bhd over and above the defendant, the latter's judgment creditor and contractor. The court decided in favour of the plaintiff and the defendant was ordered to pay the proceeds realised from the security to the plaintiff, whilst the borrower/chargor (Asia Petroleum Hub Sdn Bhd) was not a party to the action.

Whether The Plaintiffs' Charges Cover The Monies Deposited With The Defendant

[30] The defendant's allegation that the plaintiffs have failed to prove that the plaintiffs' charges cover the monies deposited with the defendant is with respect without any merit. My reasons are these.

[31] It is not disputed that whether the plaintiffs' charges cover the monies depends on the terms of the plaintiffs' four debentures, particularly, the provision creating the charge, ie, cl. 3.1(b) of all four debentures, exhs. MBB-1, MBB-2, MBB-3 and MBB-4. I find cl. 3.1(b) is similarly worded in all the four debentures (exhs. MBB-1, MBB-2, MBB-3 and MBB-4 at pp. 4, 28, 58 and 87, plaintiffs' affidavit in support) as follows:

> the undertaking of the Borrower and all its other movable and immovable property, other assets, all book debts and proceeds of book debts and other debts revenues claims and rights whatsoever and wheresoever, both present and future (including **bank deposits and credit balances**) and all things in action due or owing or which may become due or owing to or purchased or otherwise acquired by the Borrower.
>
> (emphasis added) ('**common provision creating the charge**')

[32] I wish to make some observations on cl. 3.1(b) appearing in all the four debentures:

(a) The said clause as reproduced above is common in all the four debentures save for some slight differences:

  (i) in exhs. MBB-1 and MBB-4, the phrase "by way of a first floating charge" precedes the common provision creating the charge;

  (ii) in exhs. MBB-2 and MBB-3, the phrase "by way of a third floating charge" precedes the common provision creating the charge;

  (iii) in exh. MBB-3, the phrase "by way of a fourth floating charge" precedes the common provision creating the charge; and

  (iv) the term 'borrower' instead of 'customer' is used in cl. 3.1(b) in exhs. MBB-1, MBB-2 and MBB-4 whilst the term 'customer' is used instead of 'borrower' in exh. MBB-3; however the term 'borrower' or 'customer' refers to 'Instyle'.

(b) Thus by virtue of the existence of the common provision creating the charge in cl. 3(1)(b) of all the four debentures, I find cl. 3(1)(b) expressly and unequivocally creates a charge over Instyle's undertaking and assets both present and future including bank deposits and credit balances.

[33] I shall now address three main arguments of the defendant which can be culled from the defendant's submission to support the defendant's contention that the plaintiffs' charges do not cover Instyle's monies deposited with the defendant.

[34] First, the defendant argues that the plaintiffs' debentures, exhs. MBB-2 and MBB-3 do not create a charge over the monies. With respect I find the defendant's argument is misconceived for the reasons which have been succinctly submitted by the plaintiffs as follows:

(a) The Defendant's argument is based only on the general definition provision in cl. 1.2 of MBB-2 and MBB-3 where 'Charged Property' is only defined as being 2 plots of land.

(b) This argument of the Defendant overlooks that cl. 1.2 is only a general definition provision and it is expressly provided in cl. 1.2 that the expression has the meaning defined 'except where the context otherwise requires'.

(c) Cl. 3.1(b) is the operative and specific provision for the charge created by MBB-2 and MBB-3. Cl. 3.1(b) expressly creates a charge over the undertaking, assets and monies. Cl. 3.1(b) must necessarily prevail over the general definition provision in cl. 1.2 which is only a general definition provision and has no application where the context otherwise requires.

(d) The specific provision will prevail over the general provision. In *Qatar Islamic Bank v. Asian Finance Bank Bhd* [2015] 7 MLJ 445, 468, 469, it was said:

> there is a canon of construction, '*generalia specialibus non derogant*', which provides that if there is a conflict between two provisions in the same document, the specific provision should prevail over the general provision. This maxim has been applied in statutory interpretation but according to Bowen LJ in the English Court of Appeal case of *Curtis v. Stovin* (1889) LR 22 QBD 513, at 517, rules for construing statutes also apply to construe documents.

(e) Furthermore and significantly, the expression 'Charged Property' does not appear in cl. 3.1(b).

[35] The aforesaid reasons in my respectful view put to rest the defendant's argument that the plaintiffs' debentures, exhs. MBB-2 and MBB-3 are "totally irrelevant to the plaintiffs' action (as they were) executed specifically and solely for two plots of land which were taken by the plaintiffs as security".

[36] Secondly, the defendant argues cl. 3(1)(b) in debentures, exhs. MBB-1 and MBB-4 cannot create any floating charge over the monies because Instyle's bank account with the defendant was not in existence when debentures exhs. MBB-1 and MBB-4 were executed. The defendant relies on Professor RM Goode's book, *Legal Problems of Credit and Security*, 2nd edn at pp. 47-49. In short, the defendant contends that a floating charge cannot be created over an account that was not yet in existence. With respect I find the defendant's proposition cannot be sustained for the following reasons:

(i) In *Re Panama, New Zealand, And Australian Royal Mail Company* (1870) 5 Ch App 318, the brief facts were: A steamship company, having power to issue mortgages, bonds, or debentures, issued mortgage debentures, charging the "undertaking, and all sums of money arising therefrom," with the repayment at a specified time of the money borrowed, with interest in the meantime. Before the debentures became due the company was wound up, and the ships and other property of the company were sold. This was an appeal from the decision of Malins, VC wherein he declared that the mortgage debentures issued under the seal of the company are a charge upon the proceeds of the sale of the vessels and other property of the company. On an appeal by the official liquidator on behalf of the general creditors, the issue before the English Court of Appeal was "What are the rights of the debenture holders, the state of things being that the concern is being wound up, and that the whole of its property is being realised?" In dismissing the appeal, Sir GM Giffard LJ at 322 & 323, *inter alia*, stated:

> the word "undertaking" had reference to all the property of the company, **not only which existed at the date of the debenture, but which might afterwards become the property of the company**.
> …
> I hold that under these debentures they have a charge upon all property of the company, **past and future**, by the term "undertaking," and that they stand in a position superior to that of the general creditors, who can touch nothing until they are paid. (emphasis added)

(ii) As correctly pointed out by the plaintiffs, this is consistent with cl. 3.1(b) of the plaintiffs' four debentures which expressly provides that the undertaking and the assets both present and future including bank deposits and credit balances were charged.

(iii) A perusal of the comments by Professor Goode referred to by the defendant: summarily it is observed according to the learned author after considering

(a) the oft quoted judgment of Romer, LJ in *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284 at 295:

> I certainly do not intend to attempt to given an exact definition of the term 'floating charge,' not am I prepared to say that there will not be a floating charge within the meaning

A of the Act, which does not contain all the three characteristics that I am about to mention, *but I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1) If it is a charge on a class of assets of a company present and future. (2) If that class is one which in the ordinary course of the business of the company would be changing from time to time; and (3) If you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way so far as concerns the particular class of assets I am dealing with.*

B

(emphasis added); and

C

(b) the extract from the judgment of Buckley LJ in *Evans v. Rival Granite Quarries Ltd* [1910] 2 KB 979 at 999:

> A floating charge is not a future security; it is a present security which presently affects all the assets of the company expressed to be included in it … A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some act or event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security.
>
> When read with the extract from the judgment of Buckley L.J., [the passage of Romer, L.J.] shows the two essential ingredients of a floating charge, namely that it is a present security in a fund of assets which the debtor company is left free to manage in the ordinary course of its business. The status of the floating charge as a present security distinguishes it from a mere contract to give security at a future date on the occurrence of a designated uncertain event. Its characteristic of an interest in a changeable fund of assets distinguishes it from an agreement for the provision of security over a particular asset where attachment is postponed.

D

E

F

G

Based on the defendant's own authority of Professor RM Goode's book, with respect I find the defendant's argument fails because it is expressed by the learned author that a charge may be created over future property such as a class of assets present and future.

H **[37]** In any event, even if can be argued that a charge cannot be created over a future account, there is no evidence led by the defendant that the monies deposited in the account were not in existence at the time the plaintiffs' charges were created.

I **Whether The Amounts Claimed Were Secured By The Plaintiffs' Four Debentures**

[38] There are attempts by the defendant to raise some discrepancies in the amount owing and that some of the amount is not secured by the plaintiffs' charges. In my view this argument is a non issue; the defendant is precluded

from raising the same as it is not raised in the affidavits by the defendant. These allegations as rightly submitted by the plaintiffs are factual matters which require affidavit evidence. Hence I will not consider the arguments (see *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 at p. 615 b-c).

Whether Impractical To Consider The Issue Of Priority When The Plaintiffs Charges Have Yet To Be Ascertained

[39] It is not disputed that the plaintiffs' charges have been duly registered as required and is therefore valid (exh. NBA-2, defendant's affidavit in reply and exh. MBB-8, plaintiffs' affidavit in support). Likewise defendant's charge has been registered and is valid. Instyle did not dispute the validity of plaintiffs' charges.

[40] The defendant submits "(A)s the plaintiffs' action is not a winding up action against Instyle, and in the absence of any winding up action against Instyle the question on priority of charges would really be academic". With respect I find there is no merit in the defendant's argument because the question of winding up does not arise only if Instyle is wound up. I draw support from *Re Panama* (*supra*) where the Court of Appeal at 323 held that "Even if the company had not stopped, the debenture holders might have filed a bill to realise the security." The winding up would not affect the plaintiffs' charges and their priority ranking between the secured creditors (both plaintiffs and defendant).

Whether Defendant Had No Notice Of The Plaintiffs' Floating Charge

[41] The defendant alleges that it was unaware of the plaintiffs' charges until the plaintiffs brought this action against the defendant. With respect I find this argument to be misconceived. I agree with the following reasons proffered by the plaintiffs:

[42] First, it is evident that the defendant is aware of the plaintiffs' charges as the defendant's own solicitors, Zainul Rijal Talha & Amir, had by a letter dated 12 January 2009 (exh. NBA-6, defendant's affidavit in reply) sought the plaintiffs' consent to exclude certain assets (including the monies) from the plaintiffs' charges. At para. 3 of the letter, it is stated:

> **As we take note that the Customer has created a fixed and floating charge in your favour**, we would therefore appreciate if you could issue a letter of no objection to be addressed to our client on the creation of charge in our client's favour and further give consent to exclude all securities as mentioned above from the said debenture.
>
> (emphasis added)

[43] Secondly, the fact that the defendant sought the plaintiffs' consent to exclude the monies from the plaintiffs' charges goes to show that the defendant was well aware that the plaintiffs' charges covered the monies. In *Kay Hian & Co (Pte) v. Jon Phua Ooi Yong & Ors* [1988] 1 LNS 216; [1989] 1 MLJ 284 at 287 E-F left column, Chan Sek Keong J (as he then was) stated:

A subsequent specific chargee who has notice of a restriction clause in a Floating charge is bound by it. He cannot take advantage of the nature of a floating charge as a security (with the inherent weakness that the chargor may deal with the property in the ordinary course of its business) by taking a specific charge on and claiming priority to the same property when he has notice or ought to have notice that it is being given by the chargor in breach of his contractual obligation to the debenture holder.

[44] At 288 of *Kay Hian* case, His Lordship further held:

The issue is who has to prove that he has priority in respect of the 8,000 SPH shares and what are the elements of that burden of proof. As I have already stated, this is a contest between a prior floating chargee and a subsequent specific chargee. The general principle is that whoever makes an assertion must prove it. In the present case, the receivers and managers have no need to assert priority against the third defendants. *They only need to produce the debenture which gives the debenture holder a floating charge before any other claimant. It is the third defendants who have to assert that they have displaced the prior encumbrancer* in respect of the 8,000 SPH shares: they are asserting priority. Accordingly, they have the burden of proof. (emphasis added)

[45] Since the plaintiffs have produced the plaintiffs' charges, following *Kay Hian* case which is of persuasive value, the burden rests with defendant as the subsequent chargee to prove that it has displaced the plaintiffs as the prior chargees.

[46] I find the plaintiffs have adduced evidence to establish the plaintiffs' contentions in paras. 5(a) to (f) above. Hence in light of the factual matrix of this case where the plaintiffs are able to adduce evidence whereby the defendant are aware of the plaintiffs' charges and that consent was only limited to the specific assets specified; this in my respectful view negates the defendant's argument that the defendant did not have actual notice of the contents of the plaintiffs' charges and they do not bind the defendant. In fact I find the plaintiffs have satisfied the requirement of the notice relied on by the defendant in the extract of Professor Goode at p. 41 of *Legal Problems of Credit And Security and Credit and Security in West Malaysia*, *the Legal Problems of Development Finance* by Jaginder Singh, David E Allan, Mary E Hiscock & Derek Roebuck at pp. 313-314.

Whether The Plaintiffs Are Estopped

[47] The defendant argues that the plaintiffs are estopped from claiming priority over the monies. With respect the defendant's argument is misconceived because the plaintiffs did not at any time lead the defendant to believe that the plaintiffs consented to the monies being excluded from the plaintiffs' charges. Rather it was expressly made known to the defendant that other than the certain specific assets that the plaintiff had agreed to exclude which did not include the monies, the plaintiffs' right as debenture holder remains intact. To reiterate, the evidence shows it was defendant who still proceeded to take a charge over the monies knowing that the plaintiffs had not excluded the monies from the plaintiffs' charges.

Other Matters

[48] The defendant relied on the decision of McMurdo J in *Bank of Western Australia Limited v. National Australia Bank Limited* [2011] QSC 379 ('*Bankwest* case') for the proposition that a floating charge will crystallise contemporaneously with the creation of a subsequent charge and not prior to or sequentially (see paras. 31 & 41 of *Bankwest* case). The defendant contends that the plaintiffs' charges do not have priority over the defendant's charge since they all occurred contemporaneously.

[49] With respect, *Bankwest* case can be distinguished as (i) the subsequent chargee (NAB (National Australia Bank, first defendant)) did not have actual notice of the first chargee's interest (the plaintiff (*Bankwest*)) (see para. 33 of *Bankwest* case). And (ii) neither did the subsequent chargee seek the first chargee's consent and then proceeded to take a charge after the first charge had refused consent. To reiterate, it is not disputed in the present case, the defendant had actual notice of the plaintiffs' charges over, amongst others, the monies and was fully aware that they required the plaintiffs' consent to take a charge over the monies. The defendant had requested the plaintiffs' consent to take security over certain assets including the monies. The plaintiffs consented to the defendant taking security over some assets but not the monies.

[50] Therefore on the factual matrix of the present case, the defendant's charge cannot override the plaintiffs' charges premised on the principle in *Kay Hian* case alluded to in paras. 43-44 above.

Conclusion

[51] For all the foregoing reasons I accordingly made the orders referred to in para. 8 above.